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CASE NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

IMPERIAL MERCHANT SERVICES, INC., a California corporation, doing business as CHECK RECOVERY SYSTEMS,

Petitioner,

-vs-

BRANDY G. HUNT, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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LAW OFFICES OF CLARK GAREN,
CLARK GAREN, CALIF. STATE BAR #50564
P. O. BOX 1790,
PALM SPRINGS, CALIFORNIA 92263
TELEPHONE: (760) 323-4901
FAX: (760) 288-2080

ATTORNEY FOR PETITIONERS

QUESTIONS PRESENTED

The Ninth Circuit affirmed the order of the District Court requiring a class action defendant to advance the class notice costs prior to entry of a final judgment. This order requires the Defendant to finance the cost of the Plaintiffs' litigation, even if the Defendant ultimately prevails. This order violates the precedent established by this Court in *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 and *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S. Ct. 2380 (1978) that all class notification costs are initially the responsibility of the plaintiff.

The three questions presented are:

1. In an appeal under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153, does the appellate court have jurisdiction to review the class certification order and underlying liability issues for error or is its jurisdiction limited to a review of the notice cost order for abuse of discretion.

2. When there is no established precedent to determine liability, can the defendant be ordered to pay the class notice costs prior to the entry of a final judgment.

3. Is payment of the cost of sending the class notices the obligation of the plaintiff, or can the District Court shift the obligation to the defendant prior to the entry of a final judgment when the plaintiff is unable to pay the class notice costs?

LIST OF PARTIES

All of the parties below are listed in the caption. In addition, The National Consumer Law Center, The Impact Fund, Public Citizen, Public Advocates, Inc., and Asian Pacific Legal Center appeared as *amicus curiae* in support of Respondent.

CORPORATE DISCLOSURE STATEMENT

Plaintiff IMPERIAL MERCHANT SERVICES, INC., a California corporation, doing business as CHECK RECOVERY SYSTEMS, sometimes hereinafter referred to as "IMS", does not have a parent corporation and does not have any publicly held corporation that owns any of its stock.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems,* reported at 560 F. 3d 1137. *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The opinion of the Ninth Circuit was rendered on March 31, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RULE 23, FEDERAL RULES OF CIVIL PROCEDURE

23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable

under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require–to protect class members and fairly conduct the action–giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed

accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing

order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

RULE 54, FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
(iii) state the amount sought or provide a fair estimate of it; and
(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of

Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

STATEMENT OF THE CASE

This Petition asks this Court to intervene in the practice developed in the District Courts and approved by the Ninth Circuit of ordering a defendant to finance the plaintiff's cost of litigation by forcing the defendant to pay substantial class notification costs prior to the entry of a final judgment against the defendant. This practice violates the precedent established by this Court in the case of *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 and *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380 (1978).

The facts in this case are undisputed.

HUNT purchased goods, wares, and merchandise for $137.15, and paid for them with a dishonored check. HUNT then filed for bankruptcy. HUNT then filed a class action in United States District Court against IMS for violating the Federal Fair Debt Collection Practices Act (hereinafter referred to as "F.D.C.P.A."). The F.D.C.P.A. case was based

solely on the argument that the recipient of a dishonored check may not impose *both* the returned check charge permitted by *Civil Code Section* 1719 *and* prejudgment interest under *Civil Code Section* 3287. There is no established precedent on this issue (*Imperial Merchant Services, Inc., a California corporation, doing business as Check Recovery Systems vs. Brandy G. Hunt*, 528 F. 3d 1129, 1130)

IMS then timely filed a Complaint in the Bankruptcy Case of HUNT seeking a fraud judgment based on the underlying debt for a dishonored check and HUNTs' bank records that proved Plaintiff wrote 47 consecutive N.S.F. checks over a two month period without making even one single deposit to her account to cover the checks she was writing!

A.

THE BANKRUPTCY CASE APPEAL

The Bankruptcy Court granted the IMS Motion for Summary Judgment and found HUNT was liable for fraud. However, the Bankruptcy Court refused to award IMS both the returned check charge permitted by *California Civil Code Section* 1719 and interest under *California Civil Code Section* 3287 as damages. IMS appealed the portion of the judgment denying IMS interest under *California Civil Code Section* 3287 to the Ninth Circuit as 9th Circuit Case Number 07-15976. The Ninth Circuit referred the question of liability to the California Supreme Court, which accepted the referral as California Supreme Court Case Number S 163577. This case is hereafter referred to as THE BANKRUPTCY

CASE APPEAL. The BANKRUPTCY CASE APPEAL has now been briefed before the California Supreme Court and oral arguments were heard on May 28, 2009. The California Supreme Court will make a final resolution in THE BANKRUPTCY CASE APPEAL and establish binding precedent to determine whether the recipient of a dishonored check may charge the dishonored check writer *both* interest under *California Civil Code Section* 3287 and a returned check charge under *California Civil Code Section* 1719. HUNT's theory of liability in the F.D.C.P.A. case will also be resolved by the BANKRUPTCY CASE APPEAL now pending before the California Supreme Court as Case Number S 163577 and as 9th Circuit Case Number 07-15976.

B.
THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT CASE

The District Court also granted a partial summary judgment to HUNT on the class action she filed under the Federal Fair Debt Collection Practices Act (hereinafter referred to as the "F.D.C.P.A."); certified one sub-class consisting of those proposed class members who did not pay any interest under F.R.C.P. Rule 23(b)(2); and certified another sub-class consisting of those proposed class members who actually did pay interest under F.R.C.P. Rule 23(b)(3) . While the liability issue was being resolved by the appellate courts in the BANKRUPTCY CASE APPEAL, HUNT filed a motion in the F.D.C.P.A. case to require IMS to pay the costs of notifying the members of the class. The District Court granted HUNT's motion to require IMS to pay the cost of

producing and sending the notices to the class members certified under Rule 23(b)(3). IMS filed this appeal of the order requiring IMS to pay the costs of notifying the members of the class under the authority of *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153. The opinion issued by the Ninth Circuit Court of Appeal in this *Eisen* appeal is the subject of this Petition for Writ of Certiorari and is hereinafter referred to as the CLASS NOTICE ORDER APPEAL.

The Ninth Circuit set oral argument on the CLASS NOTICE ORDER APPEAL while the BANKRUPTCY CASE APPEAL was before the California Supreme Court. The Ninth Circuit published its opinion in the CLASS NOTICE ORDER APPEAL on March 31, 2009 before the California Supreme Court could rule on liability.

REASONS FOR ALLOWANCE OF THE WRIT

The CLASS NOTICE ORDER APPEAL challenges the practice developed by class action attorneys of requiring a defendant to finance the plaintiff's cost of litigation by requiring defendants to advance substantial costs to notify class members prior to a determination of final liability. The defendant has no effective remedy to recover those costs if it ultimately prevails in the litigation and is eventually found not to be liable to the plaintiff or if the Class Certification Order is eventually found to be wrong.

The Ninth Circuit engaged in the following rationalization to disregard this compelling argument. It held:

> **"IMS asserts that it will be unable to recollect notice costs from Hunt if**

> **IMS prevails on its merits appeal because Hunt has filed for bankruptcy. It argues that the district court's decision risks permanently depriving IMS of the notice cost amount, even of the outcome of the merits appeal entitles IMS to recover the notice costs it pays. This argument, however, overlooks the likelihood that had notice costs been placed on Hunt, Hunt might have had equal difficulty collecting from IMS if she prevailed in the merits appeal."**
>
> ***Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems,*** **reported at 560 F. 3d 1137, 1144**

The Ninth Circuit refused to acknowledge that class notice costs are advanced by the attorneys for the class, not the named class plaintiff, even though the obligation to pay those costs is the obligation of the plaintiff. If the plaintiff, or rather the plaintiff's attorneys, are unable or unwilling to pay the notice costs, the class action is not supposed to proceed (*Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153). There is no justification to transfer the obligation to pay the notice costs from the plaintiff to the defendant because the plaintiff is unable to pay the notice costs.

The class action industry is often operated as a legal extortion operation by plaintiff class

action attorneys. In this case, HUNT's attorneys used the class action procedure to extort hundreds of thousands of dollars in settlements from other debt collectors on a theory of liability that was completely unsupported by any binding legal precedent. When your Petitioner decided to litigate this case to obtain binding precedent that would establish the validity or lack thereof of the theory advanced by HUNT's attorneys, HUNT's attorneys placed every procedural roadblock they could to avoid appellate review. Seeking the class notice order was only one of many efforts of the attorneys for HUNT used to avoid appellate review, and it illustrates why class action notice costs must be the obligation of the plaintiff until final judgment is entered as has been stated by this Court on many prior occasions.

In this case, the average potential award to class members is under $5.00 per member. The cost of complying with the class notice order, which Defendant will never be able to recover from Bankrupt Plaintiff Brandy Hunt, is almost as much as the Defendants' potential liability. Therefore, the Ninth Circuit Class Notice Order has the legal effect of making the Defendant a loser even if it ultimately prevails in the litigation.

The class action industry is already profitable enough. If an attorney or the client believes there is a valid class action case, the attorney or the client can advance the costs of notifying the class. If the attorney or the client does not believe in the class action case sufficiently to be willing to advance these costs, the class action cannot be allowed to proceed. The deep pockets of a defendant should never be utilized to finance the class notice costs, or any of

the plaintiff's cost of litigation, in advance of the entry of a final judgment.

Review by this Court is required to establish uniformity in a practice that seldom reaches appellate review. As the Ninth Circuit observed:

> **"Even if it is assumed that we have discretion to dismiss this case as "anticipatorily moot," we decline to do so because this case gives us an opportunity to decide an issue that often arises in district courts but typically evades appellate review. So far as we are aware, no appellate court has addressed in a published opinion whether a district court's determination that a class action defendant is liable on the merits entitles the district court to shift notice costs to that defendant. This absence of authority is not surprising. Because the losing party in a class action typically is responsible for class notice costs, there is no need for an appellate court reviewing a final merits judgment also to review a notice cost order that is based on a party's liability. Even when a party is able to appeal an interlocutory notice cost order that is based on a liability determination, by the time the case is adjudicated the district court may have calculated damages and issued a final judgment, rendering the notice cost issue moot. Nonetheless, in cases where liability is disputed on**

appeal or where there is a considerable lag between the notice cost order and a final judgment, the imposition of notice costs could be a significant burden on a party, one it could not always recoup if it later prevails on liability in its appeal. Here, IMS has argued that it cannot afford to continue operations and pay the class notice costs. There may also be cases where absent the shifting of notice costs upon determination of summary judgment liability, plaintiffs would have difficulty funding notice costs if the class is extremely numerous. It is perhaps not an easy question, but having considered all these circumstances we hold that we may consider an interlocutory appeal of an order shifting class notice costs, even if the issue may likely become moot at some time in the near future. We therefore proceed to assess the merits of the order shifting class notice costs."

Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems, **reported at 560 F. 3d 1137, 1142 - 1143**

District Courts throughout the nation are ordering defendants to finance the plaintiff's cost of litigation by requiring defendants to pay the

class notice costs. This Court has always stated that class notice costs are not the obligation of the plaintiff. This Court must grant this Petition for Writ of Certiorari to establish nationwide standards and rules for the transfer of class notice costs to defendants that the District Courts will have to follow.

I
REVIEW IS WARRANTED TO ESTABLISH WHETHER THE APPELLATE COURT IN AN *EISEN* APPEAL HAS JURISDICTION TO REVIEW THE CLASS CERTIFICATION ORDER OR TO MERELY REVIEW THE NOTICE COST ORDER FOR ABUSE OF DISCRETION

A
EFFECT OF F.R.C.P. RULE 23(f)

Defendant did not seek permission to seek interlocutory appellate review of the Class Certification Order under F.R.C.P. Rule 23(f).

After the time for Defendant to seek interlocutory review of the class certification order expired, Plaintiff moved to require Defendant to pay the notice costs. Unlike the review under F.R.C.P. Rule 23(f), review of the order requiring Defendant to pay the notice costs can be appealed without permission. Defendant timely sought appellate review of the class notice order.

When Plaintiff obtained an order from the District Court that required Defendant to pay the notice costs, Plaintiff created a right of appeal that did not *previously* exist. The right to appeal

under the *Eisen* case exists *in addition to, AND NOT INSTEAD OF*, the permissive appeal provided for by F.R.C.P. Rule 23(f). A permissive appeal provided for in F.R.C.P. Rule 23(f) is *NOT* available in *every* case; an appeal as a matter of right is only available in cases where the District Court has ordered the defendant to pay the notice costs in advance of a final judgment.

In the CLASS NOTICE ORDER APPEAL, the Ninth Circuit found it had no jurisdiction to review the class certification order in an *Eisen* appeal, and it therefore refused to review the Class Certification Order in the appeal that is the subject of this Petition for Writ of Certiorari. The Ninth Circuit found that F.R.C.P. Rule 23(f) established the exclusive procedure for review of the class certification issues prior to entry of a final judgment.

This published opinion of the Ninth Circuit renders the creation of the right to appellate review of the Class Notice Order created by the United States Supreme Court under *Eisen* meaningless! If the appellate court cannot consider all of the class certification action issues, as well as the eventual liability of the defendant, in an *Eisen* appeal, the defendant is denied an effective appellate review of a class notice order. An appeal of the order that defendant pay the class notice costs must necessarily include any issue that would establish that the District Court was wrong to order the defendant to pay the class notice costs. Improper certification of the class is the major factor that would establish that the District Court was wrong. Any interpretation that deprives defendant of the ability to seek appellate review of the class certification order,

as well as underlying liability, to establish that the District Court was wrong has the legal effect of denying the defendant an effective appellate review of the class notice order and rendering the *Eisen* appeal meaningless.

The legal authorities cited by the Ninth Circuit in support of this argument are not applicable. In *Plata v. Davis*, 329 F. 3d 1101, 1107 (9th Cir., 2003) the plaintiff sought to appeal an order denying certification of a class by classifying it as a request for an injunction. This Court found no jurisdiction to hear the appeal because the order appealed from was not an appealable order. This case has no bearing on this case because the *Eisen* case has *already* established that this is an appealable order.

The Ninth Circuit also cited precedents permitting an interlocutory appeal of a class certification order when it was "inextricably bound up" in a class wide injunction appealable under 28 *United States Code* 1292(a)(i) even though the defendant did not comply with F.R.C.P. Rule 23(f).

The distinction drawn by the Ninth Circuit between an appeal of a class wide injunction and a class notice order is completely illogical and invalid. Once the class notice order is before the appellate court, the appellate court must have jurisdiction to consider *any* reason the class notice order is wrong. Certainly, the class certification order, as well as underlying liability, are key issues that must be raised before a defendant can be deprived of substantial amounts of money to pay the class notice costs.

Since F.R.C.P. Rule 23(f) is not the jurisdictional basis for this appeal, Defendant should not be required to satisfy the criteria to

establish Rule 23(f) jurisdiction. An *Eisen* appeal should include, at a minimum, review of the class certification order, as well as the finding of liability by the District Court. Whether or not the Court of Appeal would also have jurisdiction under F.R.C.P. Rule 23(f) should be of no consequence because the Court of Appeal was vested with jurisdiction to hear this appeal by *Eisen*.

Now that the Ninth Circuit has published its opinion in this case, this Court must grant review to provide class action defendants with the ability to obtain the effective review of a notice cost order this court intended that the *Eisen* decision to provide.

II
REVIEW IS WARRANTED TO ESTABLISH THAT A DEFENDANT CANNOT BE ORDERED TO PAY THE CLASS NOTICE COSTS PRIOR TO THE FINAL DETERMINATION OF LIABILITY IF THERE IS NO ESTABLISHED PRECEDENT TO DETERMINE LIABILITY

A.
NOTICE COSTS ARE THE OBLIGATION OF PLAINTIFF UNTIL THE ENTRY OF A FINAL JUDGMENT

> "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be

maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action....' In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action: 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' Id., at 427.

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures

applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. *The usual rule is that a plaintiff must initially bear the cost of notice to the class.* The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit. Where, as here, the relationship between the parties is truly adversary, *the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.*

Petitioner has consistently maintained, however, that he will not bear the cost of notice under subdivision (c)(2) to members of the class as defined in his original complaint. See 479 F.2d, at 1008; 52 F.R.D., at 269. We therefore remand the cause with instructions to dismiss the class action as so defined.

***Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153**

The United States Supreme Court held that, in a true adversary proceeding, *F.R.C.P. Rule 23 requires that the costs of notice be paid by plaintiff.* The United States Supreme Court made no exception to this rule if liability was established. The United States Supreme Court went on to rule that if plaintiff does not pay the costs, the portion of the class action requiring notice must be dismissed.

There is NO binding precedent from ANY Circuit Court of Appeal, other than the opinion published in this case by the Ninth Circuit, that supports ordering a defendant to pay notice costs *before final* liability has been established.

There is NO binding precedent from ANY Circuit Court of Appeal, other than the opinion published in this case by the Ninth Circuit, that hold that the inability of a plaintiff to pay the class notice order costs constitutes a reason to shift that burden to the defendant.

While several District Court decisions imposed costs after the District Court established liability, the decision imposing liability was based on a *final resolution* of the underlying facts by the District Court. None of the cases involved an interpretation of the law by the District Court with *no binding precedent* to guide it in determining liability. This distinction is particularly important in this case because Defendant has maintained from the very beginning of this case that it wanted appellate review on the liability issue to establish binding precedent.

For example, in the case of *Six Mexican Workers vs. Arizona Citrus Growers*, (1986), 641 F. Supp 259, the District Court found that the defendants intentionally violated the Farm Labor

Contractor Registration Act, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the trial court effectively resolved all the liability issues.

In the case of *Kyriazi vs. Western Electric Co.*, (1979), 465 F. Supp 1141, the District Court found that defendant discriminated against its female employees and applicants for employment, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the District Court did effectively resolved all the liability issues.

In the case of *Meadows vs. Ford Motor Co.*, (1973), 62 F.R.D. 98, the District Court found that defendant had discriminated against its female employees and applicants for employment, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the trial court effectively resolved all the liability issues.

This is a very important distinction. The standard of review on an appeal of factual findings is whether the trier of fact engaged in a clear abuse of discretion. The standard of review on an appeal of an issue of law is a *de novo* review. The appellate court does not defer to the

lower court's ruling, but *independently considers the matter anew*, as if no decision had been rendered on the matter below (*Voight v. Savell*, 70 F. 3d 1552, 1564, (9th Cir., 1995)). Thus, the likelihood that an appellant will prevail on an appeal of a determination of law is significantly greater than the likelihood that an appellant will prevail on an appeal of a determination of an issue of fact *because the latitude of review* by the appellate court *is much greater* when the appeal is based on a legal issue.

There are *NO issues of fact* in the BANKRUPTCY CASE APPEAL, and it will be based *solely* on the *determination of an issue of law*. The BANKRUPTCY CASE APPEAL will create binding precedent and determine final liability in the F.D.C.P.A. case. Final liability *cannot be established* for the purposes of imposing liability for F.R.C.P. Rule 23(b)(3) notice costs in this case *until the issue of law has been determined* in the BANKRUPTCY CASE APPEAL.

From the outset, Defendant has sought to obtain binding precedent through Appellate Review on the interest issue, the sole basis for liability. Defendant asked for Appellate Review at every stage of these proceedings. Plaintiff consistently sought to delay Appellate Review. Plaintiff sought the order imposing notice costs on Defendant as part of her effort force Defendant to settle the case and avoid Appellate Review. Compelling a settlement to avoid Appellate Review is not a proper reason to order Defendant to pay for the costs of the class notice in advance of a *final* determination of liability.

Ordinarily, the costs of complying with the Class Notice Order are the obligation of the plaintiff, and are awarded against a defendant as costs in the District Court judgment. If the defendant wishes to appeal and stay payment of the judgment or execution on the judgment, the defendant merely posts a bond. If the defendant is successful on appeal, defendant pays none of plaintiff's costs. If the plaintiff is successful on appeal, plaintiff recovers either from the defendant or the bond. Regardless of the final result, both plaintiff and defendant are *guaranteed* an effective and meaningful appellate review. The order of the Ninth Circuit in this case deprives the defendant of the opportunity for a meaningful and effective review of both the Class Certification Order and the imposition of liability.

If Plaintiff wanted to avoid interlocutory appellate review, Plaintiff did not have to seek an interim order requiring the Defendant to pay Plaintiffs' Class Notice Costs. Once the Plaintiff obtained an order requiring the Defendant to pay the Plaintiffs' Class Notice Costs, the Plaintiff created a right, under *Eisen*, to obtain an interlocutory review of both the Class Certification Order and underlying liability in the case.

Since final liability will not be established in this case until a ruling is issued in BANKRUPTCY CASE APPEAL, Defendant should not be ordered to pay the notice costs now. The notice costs must either be paid by Plaintiff or the portion of the class action requiring the issuance of a notice must be dismissed.

III
REVIEW IS WARRANTED TO ESTABLISH THAT THE COST OF SENDING CLASS NOTICES IS THE OBLIGATION OF PLAINTIFF AND CANNOT BE SHIFTED TO THE DEFENDANT PRIOR TO THE ENTRY OF A FINAL JUDGMENT

A.
IT IS UNFAIR AND UNCONSCIONABLE TO ORDER A DEFENDANT TO PAY THE NOTICE COSTS BEFORE FINAL LIABILITY IS ESTABLISHED IN A CASE

In the event Defendant succeeds on the BANKRUPTCY CASE APPEAL or an appeal of the Class Certification Order in the F.D.C.P.A. case that is the subject of this Petition for Writ of Certiorari, Defendant would have no way to recover the cost of class notification from Bankrupt Plaintiff BRANDY G. HUNT. This is why the costs of issuing the class notices must be the obligation of Plaintiff *until* final liability is established by an appellate court in the BANKRUPTCY CASE APPEAL and in an ultimate appeal of the Class Certification Order.

This is also why the District Court had no jurisdiction under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 to order the Defendant to pay the notice costs now. Obviously, Bankrupt Plaintiff HUNT would have no ability or desire to reimburse Defendant for the mailing costs if Defendant prevails on appeal. This is why the United States Supreme Court held in *Eisen vs. Carlisle &*

Jacquelin, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 that the *costs of notifying the class members are a cost that must be borne by the Plaintiff.* While a judgment entered in favor of Plaintiff would include the costs incurred in notifying the members of the class as an element of damages, there is no reason to enter a separate order requiring a defendant to pay the cost of notifying the class members *in advance of the entry of a Final Judgment.*

The order of the District Court and the Ninth Circuit requiring Defendant to pay the entire notice cost in advance of a Final Judgment must be reversed.

B.
ABUSE OF DISCRETION

In the case of *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S. Ct. 2380 (1978), this Court was faced with the need to manually search defendant's records to identify the list of potential class records at a cost of $16,000.00. The District Court ordered that *Oppenheimer Fund, Inc.* pay for the cost of preparing the list, and the United States Supreme Court reversed and ordered the Plaintiff to reimburse *Oppenheimer Fund* for the cost of the record search for the following reasons:

> "The second reason advanced by the District Court was that $16,000 is a "relatively modest" sum, presumably in comparison to the Fund's total assets, which exceed $500 million. Although in some circumstances the ability of a party to bear a burden

> **may be a consideration, the test in this respect normally should be whether the cost is substantial; not whether it is "modest" in relation to ability to pay. In the context of a lawsuit in which the defendants deny all liability, the imposition on them of a threshold expense of $16,000 to enable the plaintiffs to identify their own class hardly can be viewed as an insubstantial burden. Cf. Eisen IV, supra, at 176, 94 S. Ct., at 2151. As the expenditure would benefit only respondents, we think that the amount of money involved here would cut strongly against the District Court's holding, even if the principle of Nissan did not control."**
>
> ***Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 361 - 362, 98 S. Ct. 2380, 2395 (1978)**

In the *Oppenheimer Fund* case, the United States Supreme Court refused to impose a cost of $16,000.00 on a defendant that was worth hundreds of millions of dollars, stating "*the test in this respect normally should be whether the cost is substantial*". The costs that the District Court seeks to impose on this impoverished defendant are just as substantial as the costs that *Oppenheimer Fund* was relieved of by the United States Supreme Court. The order of the District Court is an abuse of discretion under the rationale of *Oppenheimer* because the amount of costs that the Defendant was ordered to pay are *substantial*. In addition, in *Oppenheimer*, the

Plaintiff was *always* ordered to pay for the cost of mailing the notice to the class members.

C.
IT IS INEQUITABLE, UNFAIR, AND UNCONSCIONABLE TO ORDER THE DEFENDANT TO PAY THE NOTICE COSTS BEFORE THE APPEALS COURT DETERMINES THE LIABILITY OF DEFENDANT

If Defendant is ordered to advance class notice costs and eventually prevails on appeal, Defendant will be left with no remedy to recover the funds it advanced for mailing. Certainly Plaintiff, who has not yet paid the *fraud* judgment already issued against her by the Bankruptcy Court, will not be able or willing to reimburse Defendant for these costs.

This is why the District Court had no jurisdiction under *Eisen* to order the Defendant to pay the notice costs now. Obviously, *Bankrupt* Plaintiff HUNT would have no ability or desire to reimburse Defendant for the mailing costs if Defendant prevails on appeal. This is the reason the United States Supreme Court held in *Eisen* that *the costs of notifying the class members are a cost that must be borne by the Plaintiff.* Since a judgment entered in favor of a plaintiff would include the costs incurred in notifying the members of the class as an element of damages, there is no reason to enter a separate order requiring a defendant to pay the cost of notifying the class members *in advance of the entry of a Final Judgment.*

D.
ATTORNEY FEES MUST BE TREATED DIFFERENTLY THAN COURT COSTS

Amicus Curiae suggested to the Ninth Circuit that an order for an advanced payment of court costs should be treated the same as an order for an advanced attorney fees.

At the outset, there is a marked difference between these two expenses. An order for the advanced payment of attorney fees is an order that requires a payment of fees to the attorney. In the event the case is later resolved in favor of the defendant, the defendant will have effective recourse to recoup any advanced fees from the attorney.

However, an order for the advanced payment of court costs is an order that requires the payment of money *to the plaintiff*, *NOT* an order that requires a payment of money to the attorney for the plaintiff. Therefore, in the event the case is later resolved in favor of the defendant, the defendant has absolutely no recourse against the named plaintiff. This creates an additional reason not to permit an interim order as the Court of Appeal for the Fifth Circuit observed in the following passage from *Ruiz v. Estelle,* 609 F.2d 118 (5th Cir., 1980) :

> **"We need not consider whether or not the award would be appealable if the defendant had alleged and proved that the mere payment of the fees would make them unrecoverable. In that situation the order at issue might be both conclusive and unreviewable as a practical matter, whatever might be**

> **the legal theory, and, in consequence, the appellants might be in danger of irreparable harm. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3911, at 477 (1976). The defendants have made no such suggestion here. Furthermore, counsel for plaintiffs stated unequivocally during oral argument that, should the fees awarded be paid and should the court later decide that all or part of the amount paid was not due, the appropriate amount would be refunded. He offered to provide a bond as security for performance of this undertaking."**
>
> ***Ruiz v. Estelle,* 609 F.2d 118, 119 - 120 (5th Cir., 1980)**

In the case of *Rosenfeld v. U.S.,* 859 F.2d 717 (9th Cir., 1988), the Ninth Circuit Court recognized this distinction in the following portion of the opinion:

> **"If (but for this appeal) the fees would have been disbursed to the lawyers rather than retained by the prisoners and defendants, the problem would be less serious ... we assume that the district court has an inherent power to order attorneys to whom fees were paid over by their clients pursuant to court order to repay the fees should the order be reversed."**

Rosenfeld v. U.S., 859 F.2d 717, 721 (9th Cir., 1988)

The argument of Amicus Curiae that an interim order requiring a class action defendant to pay the class notice costs is treated the same as an interim order requiring the defendant to pay interim attorney fees is completely unsupported by the cases. An interim payment of attorney fees can be recouped from the attorneys, while an interim payment of class notice costs is an obligation of the plaintiff, as opposed to her attorneys, that cannot be recouped from the attorneys *or the plaintiff*.

***Eisen* specifically authorized appellate review of a order requiring a class action defendant to pay class notice costs. The same authorization of appellate review of an interim order for the payment of attorney fees is not available.**

IV
CONCLUSION

The Order of the Ninth Circuit that Defendant pay the costs of issuing the class notices prior to the final determination of liability must be reversed and remanded to the Ninth Circuit because:

1. An appeal under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153, requires the appellate court to review the class certification order and underlying liability if these issues are raised by the Appellant.

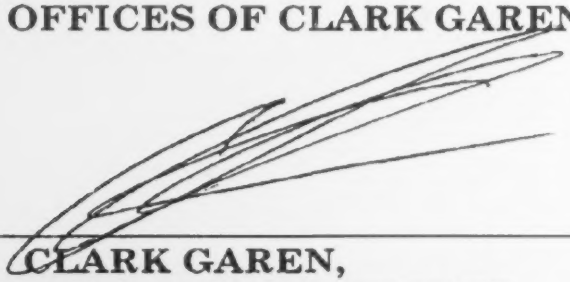
2. Defendant cannot be ordered to pay the class notice costs prior to the final determination of liability when there is no legal precedent to establish liability.

3. Payment of the cost of sending the class notices is the obligation of the Plaintiff and cannot be shifted by the District Court to the Defendant prior to the entry of a final judgment.

Dated: JUNE 4, 2009

LAW OFFICES OF CLARK GAREN

BY



CLARK GAREN,
ATTORNEY FOR PETITIONER
IMPERIAL MERCHANT SERVICES, INC.,
a California corporation, doing business as
CHECK RECOVERY SYSTEMS,